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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10238 OF 2017

Hanamant Namdev Jadhav & Ors. ..Petitioners.

V/s.

Bhiku Krushna Jadhav & Ors. ..Respondents.

Mr.Vijay Killedar for the petitioners.

Mr.Rushikesh C.Barge for respondent Nos.1A to 1E & 2.

CORAM: M.S.SONAK, J.

DATE : NOVEMBER 21, 2017

PC.:-

Heard Mr.Vijay Killedar, learned counsel for the petitioners and Mr.Rushikesh Barge, learned counsel for respondent Nos.1A to1E and 2.

2. Challenge in this petition is to the order dated April 28, 2017 passed below Exhibit 66 in Regular Civil Suit No.257/2014 by the Civil Judge, J.D. Satara dismissing the petitioners' application under section 10 of the Civil Procedure Code seeking stay of the proceedings in Regular Civil Suit No.257/2014.

3. The petitioners are the original defendant Nos.3, 5 and 6 in Regular Civil Suit No.257/2014 (subsequent suit). The petitioners were defendants in Regular Civil Suit No.112/2006 again instituted by the respondents herein seeking partition of the partition and separate possession.

4. Regular Civil Suit No.112/2006 was in fact decreed by judgment and decree dated June 17, 2009. The execution for actual partition by metes and bounds was also taken out by the respondents-plaintiffs. However, the petitioners herein had instituted an appeal against the said decree on the ground that the decree was made without proper service upon the petitioners. The appeal is pending before the Appellate Court and the execution of the decree in Regular Civil Suit No.112/2006 has been stated.

5. The cause of action pleaded by the respondents for instituting the subsequent suit i.e. Regular Civil Suit No.257/2013 is the execution of sale deed dated July 11, 2013 by the petitioners in favour of a third party, who has also been impleaded as a defendant in the subsequent suit. In the circumstances, it is the

case of the respondents that respondents are the co-owners in respect of the suit property and, therefore, on the basis of the sale deed of 2013 or even otherwise, the petitioners herein or the third party purchaser cannot disturb the possession of the respondents or otherwise interfere with the respondents' right on the possession and enjoyment of the suit property or any portion thereof.

6. Mr.Killedar, learned counsel for the petitioners submits that that the issue in the two suits are virtually common. He submits that the issues in subsequent suit are substantially similar to the issues in the previous suit. He points out that the parties are also the same. In such circumstances, he submits that the parameters of section 10 of the Civil Procedure Code stands fulfilled and application under section 10 of the CPC was required to be granted.

7. Mr.Killedar submits that the issue of co-ownership, right to partition, right to enjoyment of the suit property are all issues which have been directly raised in the previous suit. He submits that these are the very issues which will arise in the

subsequent suit. He submits that there is a clear possibility of a conflicting judgment or decree if the two suits are permitted to proceed. He submits that the appeal is a continuation of the suit and, therefore, the previous suit is deemed to be pending. For these reasons, Mr.Killedar submits that the impugned order warrants interference.

8. Mr.Barge, learned counsel for the respondents-plaintiffs in both the suits, submits that the very cause of action for instituting the subsequent suit arose after the decree that was made in the previous suit. He submits that merely because some of the parties may be common, powers under section 10 of the Civil Procedure Code cannot be exercised unless and until, there is a commonality in the issues involved in the two suits. He submits that there is absolutely no jurisdictional error in the impugned order and, therefore, this petition cannot be entertained.

9. If the rival contentions and the pleadings in the previous suit and the reliefs applied for in the subsequent suit are perused, then, it is clear that the previous suit was based on the plea that the parties are co-owners and, therefore, they are

entitled to partition in metes and bounds. The decree applied for was for partition in metes and bounds. The issues were framed in the context of pleadings in plaint because, it appears that the present petitioners who were impleaded as the defendants had not filed the written statement in the suit. In fact, it is the case of the petitioners that there was no valid service upon them and, therefore, they were deprived of the opportunity to file written statement.

10. The previous suit came to be decreed on June 17, 2009 and was put into execution by the respondents-plaintiffs. The petitioners at this stage claim to have obtained knowledge about the institution of the suit and the decree and thereafter preferred an appeal against the decree. The appeal is pending adjudication and the execution of the decree is since stayed.

11. In the year 2013, the petitioners sold a portion of the suit property in favour of a third party. Treating this as a fresh cause of action, the respondents-plaintiffs have instituted the subsequent suit seeking permanent injunction not only against the petitioners but also the third party from interfering with or

otherwise restraining the respondents from enjoyment of the suit property which is claimed to be a joint property of the petitioners and respondents herein. From the pleadings, it is clear that the cause of action for institution of such suit has in fact arisen much after the decree was made in the first suit. The second suit against the respondents is on the basis that the petitioners and the respondents are co-owners of the suit property or portion thereof and, therefore, no co-owners can alienate any portion of the joint property or even otherwise, restrain or interfere with the rights of the other co-owners. The issue involved in the subsequent suit cannot be said to be an issue which was directly or substantially an issue in the previously instituted suit. No doubt, there may be some common issues but that by itself is not sufficient to exercise powers under section 10 of the Civil Procedure Code.

12. Learned counsel for the petitioners also submits that the reliefs in the subsequent suit seek to restrain the respondents who are also co-owners of the suit property. In deciding an application under section 10 of the Civil Procedure Code, there is

no reason to go into the dispute on merits. If some relief is not liable to be granted, it is not for the petitioners to urge such contentions and oppose the grant of relief. However, that by itself is not a ground for seeking stay of the subsequent suit.

13. The reasons in paragraph 9 of the impugned order neither suffers from any jurisdictional error nor any perversity. Accordingly, there is no case made out to interfere with the impugned order under Article 227 of the Constitution of India.

14. It is made clear that the observations in the order was for the limited purpose of deciding whether application under section 10 of the Civil Procedure Code was liable to be granted or not. The observations, therefore, need not influence any of the Courts to hear and finally dispose of the suits. The two suits may be decided in accordance with law and on their own merits.

15. For the aforesaid reasons, the writ petition is dismissed. There shall be no order as to costs.

(M.S.SONAK, J.)